85-1047

No. _____

Supreme Court, U.S.
F I L E D
DEC 10 1985

IN THE

Supreme Court of the United States

October Term, 1985

THE PEOPLE OF THE STATE OF NEW YORK,
Ex Rel. CONRAD MIKULEC,
Petitioner,

vs.

KENNETH J. BRAUN, Sheriff of Erie County,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Must States have Statutes of Limitation for criminal (misdemeanor) prosecutions to accord Speedy Trial and Due Process?

2. Can Demanding State *willfully* falsify "presence" and "flight" to justify "non-discretionary" Art. IV, §2 extradition Demand?

3. Did South Carolina's falsification of "presence" and "flight" to *disguise* nature of extradition Demand, violate Due Process?

4. Did asylum State's use of Uniform Extradition Act for "comity" [Not Art. IV, §2] extradition to *non-signator* Demanding State, violate Equal Protection and Due Process?

5. Does *Michigan v. Doran* [439 U.S. 282] *ipso facto* bar a "hearing" in asylum State (New York) on South Carolina extradition Demand, where:

   A. South Carolina's Demand *falsified* "presence" and "flight"?

   B. Demand was previously dismissed *with prejudice* by Florida for South Carolina's failure to prove "presence" and "flight"?

   C. Demand charges 1975 violation of *post facto* 1976 statute?

Parties in the Court Below

STATE OF NEW YORK

COURT OF APPEALS

Motion No. 947

—0—

THE PEOPLE OF THE STATE OF NEW YORK,
Ex Rel. CONRAD MIKULEC,
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vs.

KENNETH J. BRAUN, Sheriff of Erie County,
Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI

Opinions Below

The Order dated September 17, 1985 of the New York State Court of Appeals is reported at _____ NY2d _____, and is reproduced in Appendix (i) at page 1a.

The opinion dated July 12, 1985 of the Appellate Division of the Supreme Court of the State of New York is reported at _____ AD2d _____, and is reproduced in Appendix (ii) at page 3a.

The opinion dated Jan. 15, 1985 of the Supreme Court of the State of New York, in and for Erie County, is reported at _____ Misc.2d _____, and is reproduced in Appendix (iii) at page 5a.

Jurisdictional Statement

The Order and Judgment of the New York Court of Appeals sought to be reviewed was dated September 17, 1985, and was entered on the same day in the Office of the Clerk of said Court.

No application was made by any party for rehearing by the Court of Appeals; and no order was granted respecting rehearing.

Jurisdiction is conferred on the Supreme Court of the United States to review the Judgment below of the Court of Appeals of the State of New York by Writ of Certiorari by Title 28 USCA §1257(3), and pursuant to Article III, §§1 & 2 of the Constitution of the United States.

Constitutional and Statutory Provisions Involved

ARTICLE I. LEGISLATIVE POWERS.

§10. *Restrictions upon powers of states*

Section 10. No State shall . . . . pass any *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

ARTICLE IV.

§1. *Full faith and credit among states*

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

§2. *Privileges and immunities; fugitives*

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

AMENDMENT V.

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV.

§1. *Citizenship rights not to be abridged by states*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Statutes
New York Criminal Procedure Law

ARTICLE 570—SECURING ATTENDANCE OF DEFENDANTS WHO ARE OUTSIDE THE STATE BUT WITHIN THE UNITED STATES—RENDITION TO OTHER JURISDICTIONS OF DEFENDANTS WITHIN THE STATE—UNIFORM CRIMINAL EXTRADITION ACT

Section

570.02 Short title.
570.04 Definitions.
570.06 Fugitives from justice; duty of governor.
570.08 Demand; form.
570.10 Investigation by governor.
570.12 Extradition of persons imprisoned or awaiting trial in another state.
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Uniform Criminal Extradition Act

Table of Jurisdictions Wherein Act Has Been Adopted

For text of Uniform Act, together with variation notes and annotation materials for adopting jurisdictions, see Uniform Laws Annotated, Master Edition, Volume 11.

Securing Attendance
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Jurisdiction	*Statutory Citation*
Alabama	Code 1975, §§15-9-20 to 15-9-65.
Alaska	AS 12.70.010 to 12.70.290.
Arizona	A.R.S. §§13-3841 to 13-3868.
Arkansas	Ark.Stats. §§43-3001 to 43-3030.
California	West's Ann.Cal.Pen.Code, §§1547 to 1556.2.
Colorado	C.R.S. 16-19-101 to 16-19-133.
Connecticut	C.G.S.A. §§54-157 to 54-185.
Delaware	11 Del.C. §§2501 to 2530.
Florida	West's F.S.A. §§941.01 to 941.30.
Georgia	O.C.G.A. §§17-13-20 to 17-13-49.
Hawaii	HRS §§832-1 to 832-27.
Idaho	I.C. §§19-4501 to 19-4527.
Illinois	S.H.A. ch. 60, ¶¶18 to 49.
Indiana	West's A.I.C. 35-33-10-3.
Iowa	I.C.A. §§820.1 to 820.29.
Kansas	K.S.A. 22-2701 to 22-2730.
Kentucky	KRS 440.150 to 440.420.
Louisiana	LSA—C.Cr.P. arts. 261 to 280.
Maine	15 M.R.S.A. §§201 to 229.
Maryland	Code 1957, art. 41, §§16 to 43.
Massachusetts	M.G.L.A. c. 276, §§11 to 20R.
Michigan	M.C.L.A. §§780.1 to 780.31.
Minnesota	M.S.A. §§629.01 to 629.29.
[Mississippi]	— — — —
Missouri	V.A.M.S. §§548.011 to 548.300.
Montana	MCA 46-30-101 to 46-30-413.
Nebraska	R.R.S.1943, §§29-729 to 29-758.
Nevada	N.R.S.179.177 to 179.235.
New Hampshire	RSA 612:1 to 612:30.
New Jersey	N.J.S.A. 2A:160-6 to 2A:160-35.
New Mexico	NMSA 1978, §§31-4-1 to 31-4-30.
New York	McKinney's CPL §§570.02 to 570.66.

North Carolina . . . G.S. §§15A-721 to 15A-750.
North Dakota . . . . NDCC 29-30.2-01 to 29-30.2-29.
Ohio . . . . . R.C. §§2963.01 to 2963.29.
Oklahoma. . . . . 22 Okl.St.Ann. §§1141.1 to 1141.30.
Oregon . . . . . ORS 133.743 to 133.857.
Pennsylvania. . . . . 42 Pa.C.S.A. §§9121 to 9148.
Puerto Rico . . . . . 34 L.P.R.A. §§1881 to 1881bb.
Rhode Island. . . . . Gen.Laws 1956, §§12-9-1 to 12-9-35.
[South Carolina] . . — — — —
South Dakota . . . . SDCL 23-24-1 to 23-24-39.
Tennessee . . . . . T.C.A. §§40-9-101 to 40-9-130.
Texas . . . . . Vernon's Ann.Texas C.C.P. art. 51.13.
Utah. . . . . U.C.A.1953, 77-30-1 to 77-30-28.
Vermont. . . . . 13 V.S.A. §§4941 to 4969.
Virgin Islands . . . . 5 V.I.C. §§3801 to 3829.
Virginia . . . . . Code 1950, §§19.2-85 to 19.2-118.
Washington. . . . . West's RCWA 10.88.200 to 10.88.930.
West Virginia . . . . Code, 5-1-7 to 5-1-13.
Wisconsin . . . . . W.S.A. 976.03.
Wyoming. . . . . W.S.1977, §§7-3-201 to 7-3-227.

§570.02 Short title

This article may be cited and referred to as the uniform criminal extradition act.

§570.04 Definitions

As used in this article, the following terms have the following meanings:

1. "Governor" includes any person performing the functions of governor by authority of the law of this state.

2. "Executive authority" includes the governor, and any person performing the functions of governor in a state other than this state.

3. "State," when referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America.

§570.06 Fugitives from justice; duty of governor

Subject to the provisions of this article, the provisions of the constitution of the United States controlling, and any and all acts of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

§570.08 Demand; form

No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging that the accused was

present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, except in cases arising under section 570.14 or 570.16, and accompanied by a copy of an indictment found or by information supported by an affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon, or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of the indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

§570.10 Investigation by governor

When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any district attorney in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

§570.16 Extradition of persons not present in demanding state at time of commission of crime

The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 570.08 with committing an act in this state or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, when the acts for which extradition is sought would be punishable by the laws of this state, if the consequences claimed to have resulted therefrom in the demanding state had taken effect in this state; and the provisions of this article not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom; provided, however, that the governor of this state may, in his discretion, make any such surrender conditional upon agreement by the executive authority of the demanding state, that the person so surrendered will be held to answer no criminal charges of any nature except those set forth in the requisition upon which such person is so surrendered, at least until such person has been given reasonable opportunity to return to this state after his acquittal, if he shall be acquitted, or if he shall be convicted, after he shall be released from confinement. Nothing in this section shall apply to the crime of libel.

§570.18 Issuance of warrant of arrest by governor; recitals therein

If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any police officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

§570.20 Execution of warrant; manner and place thereof

Such warrant shall authorize the police officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the aid of all police officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this article to the duly authorized agent of the demanding state.

§570.22 Authority of arresting officer

Every such police officer or other person empowered to make the arrest, shall have the same authority, in arresting the accused to command assistance therein, as police officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

§570.24 Rights of accused person; application for writ of habeas corpus

No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a justice or judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the justice or judge of such court of record shall fix a reasonable time to be allowed within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time

and place of hearing thereon, shall be given to the district attorney of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

§570.26 Noncompliance with preceding section; penalties for violation

Any officer who shall deliver to the agent for extradition of the demanding a state a person in his custody under the governor's warrant, in disobedience of the preceding section, shall be guilty of a felony.

§570.46 Guilt or innocence of accused; when inquired into

The guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the governor, or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

§570.52 Fugitives from this state; duty of governor

Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state to some agent commanding him to receive the person so charged, if delivered to him, and convey him to the proper officer of the county in this state in which the offense was committed.

§570.64 Interpretation

The provisions of this article shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it.

ARTICLE 30—TIMELINESS OF PROSECUTIONS AND SPEEDY TRIAL

Section

30.10 Timeliness of prosecutions; periods of limitation.
30.20 Speedy trial; in general.
30.30 Speedy trial; time limitations.

§30.10 Timeliness of prosecutions; periods of limitation

1. A criminal action must be commenced within the period of limitation prescribed in the ensuing subdivisions of this section.

2. Except as otherwise provided in subdivision three:

(a) A prosecution for a class A felony may be commenced at any time;

(b) A prosecution for any other felony must be commenced within five years after the commission thereof;

(c) A prosecution for a misdemeanor must be commenced within two years after the commission thereof;

(d) A prosecution for a petty offense must be commenced within one year after the commission thereof.

* * *

4. In calculating the time limitation applicable to commencement of a criminal action, the following periods shall not be included:

(a) Any period following the commission of the offense during which (i) the defendant was continuously outside this state or (ii) the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exercise of reasonable diligence. However, in no event shall the period of limitation be extended by more than five years beyond the period otherwise applicable under subdivision two.

L.1970, c. 996, §1; amended L.1981, c. 719, §2.

Statement of Case

Petitioner sought a Writ of Habeas Corpus for relief from an Extradition Warrant issued by the Governor of the State of New York on October 9, 1984 based on an Extradition D[illegible] made by the Governor of South Carolina (App. [illegible] 5a).

Previously, South Carolina had submitted the same Demand to Florida, which issued an extradition warrant thereon and arrested Petitioner on March 15, 1984. Petitioner filed a petition in Florida for a Writ of Habeas Corpus claiming that he was not "present" in the Demanding State on November 30, 1975, the time of the commission of the alleged crime.

The Florida Court gave South Carolina an opportunity to establish that Petitioner actually was "present" in South Carolina at the time of the commission of the alleged crime. When South Carolina did not supply the proof, even after an extension of its time to do so, Florida entered a "with prejudice" dismissal on May 15, 1984 (App. (iii), p. 6a; Record on Appeal below, p. 67).

South Carolina then presented the *same* Demand to the Governor of New York—which it had presented 5 months earlier to the Governor of Florida, and had defaulted on—with *full knowledge* that it could *not* show New York that Petitioner was "present" in South Carolina on November 30, 1975, the date of commission of the alleged crime.

Moreover, South Carolina at all times material had in its possession testimony given on February 15, 1984 by a convicted felon "informant" who established that Petitioner was in Florida, Puerto Rico and New York—and not in South Carolina—at the time of the alleged crime (Record on Appeal, pp. 119-125).

Thus, South Carolina knew at all times after February 15, 1984 that it *did not have* a simple and non-discretionary "fugitive" extradition case governed by U.S. Constitution Art. IV, §2. It knew that if it desired to claim that Petitioner "procured" the commission of the alleged crime from without the State of South Carolina on November 30, 1975, it would have to make the much more involved "comity" type extradition demand to the Governor of New York.

South Carolina also knew that Mississippi and South Carolina were the *only* two States that had not signed the Uniform Extradition Act (Petition, pp. 12-13); and that a "comity" [non Art. IV, §2] extradition could be quite difficult absent the procedures provided in the Uniform Act.

South Carolina nevertheless elected to send New York the same Constitutional-type Demand that it had made in Florida—and which it well knew it could not sustain. However, South Carolina, in effect, *disguised* it, so as to change its appearance, from that of an involved "comity" type extradition demand to the clothes of a simple and non-discretionary Constitutional Demand.

Petitioner objected in the New York Courts that he had not been present in South Carolina at the time of the commission of the alleged crime. Respondent then claimed that the South Carolina charge was one of conspiracy, and that the Indictment charged that Petitioner was charged "with procuring the crime" within the State of South Carolina (Record on Appeal, pp. 70-72).

Petitioner claimed, however, that he was not even in the State of South Carolina for the alleged procurement of the crime, and furnished affidavits to back up his claim (Record on Appeal, pp. 47-52, 76-87).

The New York courts held that Demand was a simple non-discretionary demand of the *Michigan v. Doran* [439 U.S. 282] type, and that Petitioner was *not entitled to a Hearing* on the allegations of the Demand that Petitioner was "present" in South Carolina, and "fled" therefrom (App. (i), (ii) and (iii) at pp. 1a, 3a and 5a).

The New York Courts in denying Petitioner a Hearing, utilized New York Criminal Procedure Law §570.08—which applies to non-discretionary Constitutional-type [Art. IV, §2] extraditions.

It held that New York's CPL §570.16, which applies to *non*-Constitutional extraditions—where, as here, the alleged fugitive was *not* "present" in the Demanding State—was not applicable, and thereby peremptorily denied his Writ of *Habeas Corpus* (App. (ii), p. 3a).

The New York Courts ignored Petitioner's claims that he was not even in South Carolina for a long period before the crime, and overlooked the fact that South Carolina had falsified the claim that Petitioner was in that State at any time proximate to the crime. The net result was that Petitioner was extradicted without a Hearing, and the right to confront the evidence against him, and to bring witnesses to show that he was not "present" in the Demanding State.

New York also did not take into account the fact that South Carolina, along with Mississippi, was the only State which was not a signator to the Uniform Extradition Act (Pt. p. 12).

The New York Courts also failed to consider that:

A. South Carolina is one of the few States which do not have a Statute of Limitations for criminal prosecutions;

B. The crimes charged had long since been barred under New York law (Pt. p. 19);

C. South Carolina made no claim or showing that Petitioner had concealed or absented himself during the intervening 9 year period;

D. Florida had already dismissed the same Demand "with prejudice" because South Carolina had been unable to show that Petitioner was "present" in that State and had "fled" therefrom;

E. South Carolina, having the informant's testimony which showed that Petitioner was *not* in that State, and knowing that Florida had dismissed, with prejudice, the same Demand, determined to make a false Constitutional-type Demand on New York, by *again* claiming that Petitioner was "present" in South Carolina (South Carolina's Demand to New York is at pp. 37-40 of the Record on Appeal; and its Demand to Florida is at pp. 55-58 of said Record on Appeal); and,

F. The South Carolina Demand, on its face, charged November 30, 1975 violations of *ex post facto* 1976 criminal statutes.

REASONS FOR ALLOWANCE OF WRIT

POINT I

Statute of Limitations on criminal prosecutions is a constitutional necessity.

South Carolina is one of the few States of the Union without a Statute of Limitations for criminal prosecutions for non-capital crimes, such as the Misdemeanors (Conspiracy, and a Burning not amounting to Arson) involved in the extradition Demands at Bar made by the Governor of South Carolina.

New York's Criminal Procedure Law, §30.10(2), provided a two year limitation for such crimes (Petition, p. 19). The crimes alleged in the Demanding State's Indictments, were committed 9 years previously, on November 30, 1975. This was 7 years after the alleged crimes would have been barred in New York State.

South Carolina did not make any claim that Petitioner had concealed himself—in fact, the testimony of the State's informant showed that he was in Puerto Rico, Miami and New York *before* the alleged crime, and that he traveled *from* New York to South Carolina as soon as he learned of the fire (Record on Appeal, p. 125).

South Carolina claimed that Petitioner was "present" on November 30, 1975, the date of commission of the alleged crime, and that he then "fled" from the State of South Carolina. However, Petitioner had evidence which he was not allowed to present at a Hearing that he was *not* "present" and had *not* "fled".

States not having a time limitation for criminal prosecutions prevent the prompt and "Speedy" trial, and Due Process disposition, of criminal charges.

See: *United States v. Marion*, 404 U.S. 307, 328; *Dickey v. Florida*, 398 U.S. 30, 45-47; *United States v. Ewell*, 386 U.S. 122; *Toussie v. United States*, 397 U.S. 112, 114-115; *United States v. Lovasoco*, 431 U.S. 783, 788; *Klopfer v. North Carolina*, 386 U.S. 213, 223-225; *Rochin v. California*, 342 U.S. 166, 173; and, *Ham v. South Carolina*, 409 U.S. 524, 526.

State criminal charges then give rise to state Extradition Demands, as in the case at bar.

POINT II

Petitioner was unconstitutionally denied a hearing.

Petitioner claimed below that:

1) He was not "present" in the State of South Carolina;

2) He did not "flee" from South Carolina;

3) Florida had dismissed the same Demand "with prejudice" 5 months *before*;

4) The Demand was *ex post facto* on its face;

5) South Carolina did not have a time limitation for criminal prosecutions;

6) New York's Criminal Procedure Law §30.10(2)(c) provided a two year limitation for such crimes;

7) The alleged crimes would have been barred in New York;

8) Witnesses had died and evidence had been destroyed in the interim; and

9) South Carolina did not make any claim that Petitioner had concealed himself.

Apparently assuming that this was a Constitutional Art. IV, §2, non-discretionary Extradition Demand, and apparently acting on the basis of *Michigan v. Doran*, 439 U.S. 282, the court below denied Petitioner a Hearing on any of his objections and claims.

We submit that *Michigan v. Doran* was not intended to be a bar to a "Hearing" in an asylum State on an extradition Demand, when objections such as the above-listed are raised, and *a fortiori*, where:

A. The Demanding State *willfully* falsified "presence" and "flight" to justify a "non-discretionary" [Art. IV, §2] extradition Demand;

B. The asylum State used the Uniform Extradition Act for a "comity" [Not Art. IV, §2] extradition to a *non-signator* Demanding State, thereby violating Petitioner's Equal Protection and Due Process rights;

C. South Carolina could not prove "presence" and "flight" in either Florida or New York;

D. The Demand charged 1975 violation of *post facto* 1976 staututе; and

E. The Florida "with prejudice" dismissal was *res judicata*, and entitled to "Full Faith and Credit".

POINT III

New York CPL §570.08, as applied, is unconstitutional.

The New York Courts overruled Petitioner's objections, without a hearing, and dismissed his Petition for his writ of Habeas Corpus based upon New York Criminal Procedure Law §570.08.

We submit that CPL §570.08, and or the Uniform Extradition Act, as applied herein by the New York Courts, or on their face, are unconstitutional to the extent that they preclude a hearing, and foreclose Petitioner's objections, herein.

Conclusion

It is submitted that a Writ of Certiorari should be granted to the New York Court of Appeals, to correct the unconstitutional violation of Petitioner's rights.

Respectfully submitted,

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Of Counsel

APPENDIX (i)
Order of the Court of Appeals of the State of New York

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of September A. D. 1985.

Present, Hon. Sol Wachtler,
Chief Judge, presiding.

4 Mo. No. 947

THE PEOPLE &c. *ex rel.*
CONRAD MIKULEC,

Appellant,

vs.

KENNETH J. BRAUN, Sheriff of Erie County,

Respondent.

Index No. H-48479.

Motions for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix (i)—Order of the Court of Appeals of the State of New York.

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

DONALD M. SHERAW
DONALD M. SHERAW
Clerk of the Court

APPENDIX (ii)

Opinion of the Appellate Division of the Supreme Court of the State of New York

STATE OF NEW YORK
SUPREME COURT
Appellate Division—Fourth Department

THE PEOPLE OF THE STATE OF NEW YORK,
Ex Rel. CONRAD MIKULEC,
Relator-Appellant,

vs.

KENNETH J. BRAUN, Sheriff of Erie County,
Respondent.

---

585. (Erie Co.)—People of the State of New York *ex rel.* Conrad Mikulec, Appellant, v. Kenneth J. Braun, Sheriff of Erie County, Respondent.—Judgment unanimously affirmed. Memorandum: CPL 570.16 is inapplicable to the facts of this case. Even though one act of the conspiracy may have occurred in Florida, the indictment and supporting documents allege that other acts comprising the crimes occurred in South Carolina and this is sufficient to permit extradition under CPL 570.08.

Since relator is accused of conspiracy and procuring arson, rather than committing the arson himself, an indictment stating "on or about" the date of the fire is sufficient to encompass a period of time prior to the time of the actual fire. Relator's proof that he was not in South Carolina on the date of the fire or three days before is thus insufficient to meet his burden to establish

by "conclusive evidence" (People *ex rel.* Higley v. Millspaw, 281 NY 441, 447) that he was not in the State when the crimes were committed.

We have reviewed relator's other contentions, but find them to be without merit. (Appeal from Judgment of Supreme Court, Erie County, Kubiniec, *J.—Habeas Corpus.*) Present: Doerr, *J.P.*, Boomer, O'Donnell, Pine, Schnepp, *JJ.*

APPENDIX (iii)

Opinion of the Supreme Court of the State of New York in and for Erie County

STATE OF NEW YORK
SUPREME COURT—County of Erie

PEOPLE OF THE STATE OF NEW YORK, *ex rel*
CONRAD MIKULEC,

Relator,

vs.

KENNETH J. BRAUN
Sheriff of Erie County.

FRANKLIN STACHOWIAK, ESQ.
Attorney for Relator

JAMES TUPPEN, ESQ.
Assistant County Attorney

SUSAN NUSBAUM, ESQ.
Assistant District Attorney

MEMORANDUM DECISION

KUBINIEC, J.

The Relator herein by virtue of a Writ of Habeas Corpus has instituted this proceeding to challenge his extradition to the State of South Carolina. On October 9, 1984, the Governor of New York State honored the request of the State of South Carolina for the return of the Relator by issuing a warrant for his delivery to the demanding state.

Appendix (ii)—Opinion of the Appellate Division of the Supreme Court of the State of New York.

On or about February 15, 1984, the Relator was indicted by the Grand Jury of Spartanburg County, South Carolina for the felony of "the burning of a building, not a dwelling house" and for the felony of "criminal conspiracy", both alleged in the indictments to have occurred "on or about the 30th day of November 1975". Thereafter, South Carolina commenced extradition proceedings setting forth in the required documentation that "such fugitive was present in this State (South Carolina) at the time of the commission of such crime".

The Relator has submitted to this Court various affidavits from individuals who attest that he was in the State of New York on November 27, 28, 29, 30, ie, on the date of the alleged arson and several days prior thereto. In view of a prior extradition proceeding maintained by South Carolina in the State of Florida which was dismissed, after the extension of several adjournments, for the failure of the South Carolina authorities to establish that the Relator was actually present in the demanding state at the time of the arson and in view of the entry of a plea of guilty to both indictments by one Daniel E. Smith in the County of Spartanburg, South Carolina on February 15, 1984, who admitted that he was the unaided perpetrator of the alleged arson on November 30, 1975, "it is apparent that the People have failed to establish the presence of the Relator in the State of South Carolina on the said date, ie, November 30, 1975."

Nevertheless, the People further maintain that the Relator is properly subject to extradition on the Conspiracy indictment, which indictment does not legally

require his presence in the State of South Carolina on the actual date the arson occurred. Since conspiracy by its very nature is an ongoing pattern of activity and conduct, the People argue that an indictment alleging a conspiracy to commit a crime "on or about" a specific date is legally sufficient to commence a prosecution.

It must be recalled that this proceeding commenced in Special Term with the People originally claiming that the conspiracy occurred the week preceding November 30th with the presence of Relator in South Carolina and the Relator submitting affidavit from individuals who swore to Relator's presence elsewhere than in South Carolina. The matter was then continued for further information from the demanding state which resulted in receipt of the sworn testimony of Daniel E. Smith taken in court immediately subsequent to his pleading guilty to the arson fire at Relator's building. A review of the testimony *does not*, however, by any fair reading come close to establishing the Relator's conspiratorial conduct in South Carolina the week preceding November 30, 1975. At best, the evidence offered by the People would tend to show that Smith and the Relator had conversations in "September, October or November" regarding Relator's financial problems which could be resolved by burning a building owned by Relator in South Carolina. Smith further stated, under oath, that he could not recall when he last spoke with the Relator prior to Thanksgiving Day, which was the date Smith prepared the incendiaries required to set the fire. Smith ignited the material and burned the building the following Saturday. Smith further stated that "a couple of weeks prior to the fire" he met Relator at an airport in Miami, Florida and received $2500.00 from him for

expenses in "preparation of this project". The record is silent as to when and how the conversation in "September, October or November" took place.

The issue here then is whether Relator was "present" in the demanding state within the ambit of a legally recognized time frame that would encompass the parameters of the indictment for conspiracy.

Relator contends that the People's reliance on such a broad time frame, especially since the indictment was filed some nine years ago, makes it virtually impossible for him to prove that he was not in the demanding state for the approximate ninety (90) days preceding the crime date in order to prevail in this prosecution.

However, this Court believes that any inability of Relator to now establish his whereabouts for the approximate period of 90 days preceding the arson is an insufficient reason to legally challenge this extradition proceeding. The time span of 90 days in a conspiracy indictment is not so broad as to deprive Relator of due process of law nor does it rise to the point of depriving him of any recognized constitutional protections. Relator has not been denied any right to contest this extradition proceeding. While the real difficulty in this prosecution may be Relator's inability to establish his whereabouts because of the lapse of nine years, the death or disappearance of witnesses, and the loss of documentary evidence, these issues have no factual or legal relevance on the instant extradition proceeding, but rather, are matters for consideration by the trial court.

Appendix (iii)—Opinion of the Supreme Court of the State of New York in and for Erie County.

The indictment herein sufficiently charges the crime of conspiracy to allege Relator's presence in the State of South Carolina within a time span that is legally sufficient and the presumption of validity of the warrant herein has not been overcome.

Relator's petition is denied in all respects. Submit Order accordingly.

JULIAN F. KUBINIEC,
Julian F. Kubiniec, *J.C.C.*

Dated: January 15, 1985
Buffalo, New York

No. 85-1047

(2)

Supreme Court, U.S.
FILED
JAN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. CONRAD MIKULEC,
Petitioner

vs.

KENNETH J. BRAUN, SHERIFF OF
ERIE COUNTY,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the petitioner in an extradition proceeding was unable to establish any reasonable ground to believe that he was not in the State of South Carolina at the time of the commission of the crime of conspiracy, did the New York court properly refuse to provide an evidentiary hearing on the issue of petitioner's presence in the State of South Carolina?

2. Did the New York courts properly decline to decide issues of South Carolina substantive and procedural law in the context of an extradition proceeding?

3. May petitioner raise an issue before this Court which has not previously been presented to the state courts?

JUDGMENT BELOW

Following his arrest on a New York Governor's warrant directing his delivery to the State of South Carolina, petitioner sought a writ of habeas corpus to review the propriety of the extradition demand. His application was denied in a memorandum decision dated January 15, 1985 and subsequent judgment (denominated an order) dated January 17, 1985, of the Erie County Supreme Court (Kubiniec, J.). The judgment was affirmed by the New York State Supreme Court, Appellate Division, Fourth Department, in a memorandum and order dated July 17, 1985. 112 A.D.2d 803. Leave to appeal to the New York State Court of Appeals was denied by order dated September 7, 1985, 65 N.Y.2d 610.

JURISDICTION

Jurisdiction is asserted pursuant to 28 U.S.C. §1257(3) and Article III, §§1, 2 of the United States Constitution.

STATEMENT OF THE CASE

On March 12, 1984, the Grand Jury of the County of Spartanburg, State of South Carolina, indicted petitioner for the felony crimes of Burning a Building not a Dwelling, in violation of Section 16-11-120 of the 1976 Code of Laws of South Carolina and Criminal Conspiracy, in violation of Section 16-17-410 of the 1976 Code of Laws of South Carolina (R41-44).[1] The crimes

---

[1] Numbers in parentheses preceded by the letter "R" refer to the pages of the Record submitted to the New York State Supreme Court, Appellate Division.

were alleged to have occurred on or about November 30, 1975.

On or about July 13, 1984, petitioner surrendered to New York authorities pursuant to the warrant issued under those indictments. Thereafter, on October 9, 1984, a Governor's Warrant was issued pursuant to the Uniform Criminal Extradition Act. On October 19, 1981, petitioner secured a writ of habeas corpus to test the continued detention under the warrant and the propriety of the extradition proceedings (R22 et seq.).

In support of that application, petitioner submitted affidavits from a number of individuals attesting to the fact that he was not present in the State

of South Carolina on the date of the arson, nor for several days immediately preceding that date (R47-50). He was unable, however, to establish his absence from the state for the period of September, October and November during which preparations were made for the arson.

By a memorandum decision dated January 15, 1985, and judgment (denominated order) dated January 17, 1985, petitioner's application for a writ of habeas corpus was denied.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner's application for a writ of habeas corpus sought to challenge his detention under the New York Governor's warrant. That application

sought to raise a number of legal issues not amendable to determination in an extradition proceeding and otherwise failed to factually establish those that are. Therefore, the courts of New York properly declined to issue a writ of habeas corpus. On this application, however, petitioner now seeks to raise yet another issue not previously presented to the New York courts. That issue, whether the South Carolina authorities "falsified" certain aspects of its extradition demand, is not ripe for review by this Court.

Propriety of issues in extradition proceedings

On this application, petitioner seeks to have reviewed a number of issues which are not susceptible of determina-

tion in the context of an extradition proceeding. Specifically, petitioner seeks to have this Court determine the constitutional necessity for a statute of limitations in the demanding state where the issue has not been presented to the courts of the demanding state. In addition, he seeks to raise questions as to 1) whether the particular statute under which the petitioner is being prosecuted is an ex post facto enactment, 2) whether New York's statute of limitations applied to the South Carolina extradition demand, and 3) whether a prior Florida determination as to extradition, specifically designed not to have preclusive effect, was binding on the courts of New York. Other issues raised before the New York Courts are apparently not presented here.

The particular crime for which extradition was ordered was the crime of conspiracy which the lower court found to be one of a continuing character. Although appellant established that he was not present in South Carolina at the time of the arson fire on November 30, 1975, or for several days preceding that date, the lower court declined to order his extradition with respect to the arson charge. He could not, however, controvert the allegation that he was not present in the state during the three month period during which the co-conspirator alleged that discussions regarding the arson had taken place. Because the indictment specifically alleged that appellant "in Spartanburg County on or about the 30th day of November, 1975, did aid, counsel or

procure the burning of a building," (R41, 43), South Carolina authorities adopted a theory of prosecution which was properly the subject of a constitutional extradition demand under the United States Constitution and New York Criminal Procedure Law §570.08.

The entire concept of extradition derives from Article IV, §2, cl.2, of the United States Constitution, which provides as follows:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

In Michigan v. Doran, 439 U.S. 282 (1978), this Court explained the

purpose behind the Extradition Clause and noted its intent.

> "Interstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, §2, cl. 2, of the Constitution.
>
> ***
>
> The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial." 439 U.S. at 288.

The court reiterated its rejection of the notion that the process of extradition is one that determines guilt or innocence and listed the four issues which may be considered on such a proceeding:

> "A governor's grant of extradition is prima facie evidence that the consitutional and statutory requirements have been met.
>
> ***
>
> Once the governor has granted extradition, a court considering release on habeas corpus

> can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradtion; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." 439 U.S. at 289.

In affirming the lower court's denial of habeas relief here, the Appellate Division, Fourth Department, relied upon the New York State Court of Appeals decision in People ex rel. Higley v. Millspaw, 281 N.Y. 441, which had adopted a restricted listing of what could be litigated in the context of an extradition proceeding.

> "We may not consider the question of the sufficiency of the indictment as a pleading ... nor the possibilities resulting from the trial ... nor the merits of the defense to the indictment or the motive and purposes of the extradition

proceedings ..." 281 NY at 445 (citations omitted)

The legal issues which petitioner presents at this time are, at best, characterized as due process claims. To allow the litigation of general due process claims at this stage seriously subverts the intent behind Articve IV, §2, cl. 2 of the United States Constitution and the holding of Michigan v. Doran, supra. There, the Court was confronted with the question of whether the courts of an asylum state could review the existence of probable cause for an arrest in the demanding state. In rejecting the ability to do so, this Court held that:

> "Under Art. IV, § 2, the courts of the asylum state are bound to accept the demanding state's judicial determination since the proceedings of the demanding state are clothed with the

> traditional presumption of regularity. In short, when a neutral judicial officer of a demanding state has determined that probable cause exists, the court's of the asylum state are without power to review the determination. Section 2, cl. 2, of Art. IV, its companion clause in §1, and established principles of comity merge to support this conclusion. To allow plenary review in the asylum state of issues that can be fully litigated in the charging state would defeat the plain purposes of the summary and mandatory procedures authorized by Art. IV, §2." 439 U.S. at 290.

A claim regarding the absence of a statute of limitations, asserted under the Due Process clause of the Sixth Amendment stands on no firmer footing than the Fourth Amendment claim raised in Doran, supra.

Appellant's related claim that the delay in indictment similarly deprives

him of due process rights by his inability to defend himself must also receive the same treatment. Since South Carolina has no statute of limitation, the indictment for a nine year old offense is valid on its face. If due process concerns are to be considered, they must be left solely to the demanding state for resolution.

Similarly, the issue of the application of an ex post facto law must also fail. Although appellant contends that the issue is one which may be determined from the face of the papers, such is not clear. Even if it can be assumed that such a constitutional challenge may be raised in an extradition proceeding, whether the crimes charged are the result of the application of an ex post facto law is not apparent.

In Calder v. Bull, 3 U.S. [Dall] 386, the Supreme Court established the standard for the evaluation of claimed ex post facto applications:

> "1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender."

There is no indication in this record that conduct for which this appellant was indicted was not criminal, was less serious, was punished less

severely or required more evidence to prove when it was committed than now. In the absence of such proof, appellant has failed to satisfy his burden of proof with respect to that issue.

Finally, the lower court properly declined to give res judicata effect to the prior Florida voluntary dismissal of an extradition proceeding. When the Florida authorities were unable to obtain a second Governor's warrant and were unable to proceed with proof on the existent habeas corpus proceeding, a Notice of Voluntary Dismissal was submitted which included the following reasons for the dismissal.

> "10. The State has not yet received new Governor's Papers curing this defect, the Governor's office of the State of Florida has not, as of this

> date, received new requisition documents. Therefore, the State must now either proceed in a hearing on the Petition for Writ of Habeas Corpus, and not prevail, or else must enter a dismissal.
>
> 11. Therefore, the State, rather than create a possible Res Judicata argument in the future, now enters a voluntary dismissal of the present extradition hold on the Defendant, based upon the current Governor's Warrant, with prejudice." (R66-67) (emphasis added).

Clearly, the intent was that any res judicata effect be avoided by the voluntary dismissal. Moreover, the use of the term "current Governor's warrant" in both the notice and the order indicates that the dismissal order was to apply only to the warrant then existing and not to any future warrants. In essence, a factual determination was made by the lower court as to the res judicata

intent behind the Voluntary Dismissal.

Denial of Hearing

The South Carolina indictment charged petitioner with the felonies of Burning a Building not a Dwelling and Criminal Conspiracy. Those indictments clearly established that the crimes were committed in Spartanburg County, South Carolina and were committed "on or about the 30th day of November, 1975." Petitioner challenged his presence in the State of South Carolina at the time of the crimes by submitting various affidavits attesting to his presence in another state on November 30th and for several days prior thereto. To that extent he was successful insofar as the New York courts declined to order extradition on the arson charge. How-

ever, based upon the transcript of the testimony of Daniel Smith, petitioner's co-conspirator, which established that the conversations with petitioner involving the burning of the building had occurred within a three-month period preceeding the fire (R119-120), the lower court declined to issue a writ of habeas corpus with respect to the conspiracy charge.

Specifically, the court found that a three month period for an ongoing conspiracy is not so broad a period of time as to deprive the petitioner of his ability to contest the extradition. The absence of any proof with respect to petitioner's whereabouts for the vast majority of the conspiratorial period was sufficient cause for the denial of a

hearing on that issue. The lower court was well within the ambit of its discretion to decline to hold a hearing. Because the extradition demand of the State of South Carolina is clothed in a "presumption of regularity," Michigan v. Doran, 439 U.S. at 290, and the petitioner failed to provide sufficient facts to rebut that presumption, the denial of a hearing was not error.

Preservation of Issue

For the first time in the context of the instant litigation petitioner now raises before this Court the question of whether the State of South Carolina willfully falsified evidence of presence and flight to justify its extradition demand. The issue was not presented to the courts

of the State of New York and, therefore, does not present a federal question ripe for review by this Court. See Whitney v. California, 274 U.S. 357, 362-363; Saunders v. Shaw, 244 U.S. 317, 320.

Based upon the record of the proceedings below, that there is no evidence with respect to the "falsification" of records is highlighted by the fact that petitioner has recently moved in the court of original jurisdiction to renew and reargue the application for a writ of habeas corpus on the basis that the State of South Carolina provided erroneous and incomplete information to the Governor of New York in its extradition demand. The issue of falsification has not previously been presented to the Courts of the asylum

state for review and should not be raised for the first time on a petition for certiorari.

CONCLUSION

For all of these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 16th, 1986.